*Tucker*, 86 Va. 679. There it was alleged that the purchaser had bought off, at the price of $50, a man who proposed to put in an upset bid. The Circuit Court ordered a resale provided the party who objected to confirmation would, within forty days, file an upset bid of ten *per cent.* advance. Unless he did so, however, the purchaser who had bought off this opposition was to retain the land at his bid. The court, in discussing the matter, says amongst other things: "There is no proof in the record worthy of consideration showing that any other probable bidder than Creasy was kept away from the sale, and he, as we have seen, has been bought off." The opinion is very short, and there is no statement of facts except what is given in the opinion, and hence it is difficult to form a correct judgment of it, but the latter part of the sentence quoted seems to indicate that the court thought that the purchaser had the right to buy Creasy off. If such was intended, it is in direct conflict with the principal case and must be considered as overruled thereby to the extent indicated.

The opinion in the principal case is of great practical importance, and is a clear and concise statement of the law in this State on the subject under consideration.

M. P. BURKS.

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## WILSON v. DAWSON.*

*Supreme Court of Appeals:* At Richmond.

February 2, 1899.

1. MOTION TO RECOVER MONEY.—*Section 3211 of Code—Damages for breach of contract.* Damages for an injury resulting from a breach of contract, recoverable only in an action "sounding in damages," can in no sense be considered money due upon contract, and hence a motion under section 3211 of the Code, as it stood when this motion was made, permitting a motion to be made in any case where a person was "entitled to recover money by action on any contract" cannot be maintained to recover damages for a breach of contract, or the profits which the plaintiff would have made if he had been permitted to fulfil his contract.

Error to a judgment of the Hustings Court of the city of Roanoke rendered in a proceeding by motion on a contract wherein the defendant in error was the plaintiff, and the plaintiff in error was the defendant. *Reversed.*

The opinion states the case.

*Scott & Staples*, for the plaintiff in error.

*Watts, Robertson & Robertson*, and *J. E. Yonge*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

On the — day of November, 1894, E. A. Wilson & Co., styling

* Reported by M. P. Burks, State Reporter.

themselves general contractors for the erection and construction of the United States public building in the city of Roanoke, entered into a contract under seal with Mrs. M. J. Dawson, through her agent, M. F. Normoyle, whereby she undertook to do all the foundation work of this building at prices for the masonry, excavation and concrete work stipulated in the contract, payments for the work to be made by Wilson & Co., monthly, as the work progressed, but no time was specified in the contract within which the work was to be completed, nor was there a stipulation as to the force to be employed by Mrs. Dawson in the prosecution of the work.

Mrs. Dawson entered upon the work which she contracted to do and prosecuted it till about the 12th of March, 1895, and on March 14, 1895, she received a letter from Wilson & Co. to the effect that if she did not, within three days from the receipt of the letter, have sufficient hands at work to complete her contract by the first of May, and continue them at work, and keep them supplied with sufficient machinery and materials, they (Wilson & Co.) would go upon the premises and do the work themselves, holding her (Mrs. Dawson) responsible for all losses which they (Wilson & Co.) might incur on account of having to pursue that course. Mrs. Dawson not having resumed work under her contract, Wilson & Co., March 19, 1895, went upon the premises and proceeded to do the work which Mrs. Dawson had contracted to do, and so notified her of their action, whereby she was dispossessed of the premises, and deprived of the right to prosecute this work further.

On the 12th of November, 1895, the following notice, served upon E. A. Wilson, was filed in the clerk's office of the Hustings Court of the city of Roanoke:

"To E. A. Wilson and H. D. Schenk, partners as E. A. Wilson & Co.:

"Take notice, that on the 1st day of the December term, next, of the Hustings Court for the city of Roanoke, Va., being the 2d day of December, 1895, I will move the said court to render judgment against you, and each of you, for the sum of twelve hundred and forty dollars and thirty-two cents ($1,240.32), with interest thereon from the 19th day of March, 1895, being the amount which I am entitled to recover on a certain contract in writing, under seal, bearing date on the —— day of November, 1894, between E. A. Wilson & Co. of the first part, and myself, as party of the second part, the amount due me being on account of a breach of said contract on your part, as shown by the following statement of account.

"(Signed) M. J. DAWSON,
"By counsel."

The account appended to this notice consists of thirty-one items, all

of which, except from 1 to 7, inclusive, and 27 and 28, having been abandoned at the trial, no further notice of them need be taken. Items from 1 to 7 are for masonry, excavation and concrete work done, and stone quarried and delivered at the building, and stone quarried and not delivered; and items 27 and 28 are for profits claimed by Mrs. Dawson upon concrete and masonry work that she would have made had she been permitted to complete her contract.

At the calling of the case December 2, 1895, the defendant Wilson moved the court to require a further bill of particulars to be filed by the plaintiff, which was accordingly done; whereupon the defendant filed a statement of the defence of Wilson & Co. to this action. The further bill of particulars filed by the plaintiff is as follows:

"All of the items in the account filed with the notice are claimed as damages arising out of the defendant's breach of the contract in this, to-wit: that he, on or about the 19th of March, 1895, interfered with the complainants in the prosecution of the work on the contract, refused to let the plaintiffs carry out the contract, and took possession of the building, and have kept plaintiffs out ever since, and have failed to pay the amounts claimed to be due on said contract."

There was a verdict and judgment against E. A. Wilson, one of the partners of E. A. Wilson & Co., for the sum of $1,074.42 without interest, and a verdict and judgment for the plaintiff on the offsets filed by the defendant. To this judgment Wilson obtained a writ of error from one of the judges of this court.

The verdict and judgment complained of plainly include items 27 and 28 of the account sued on, which are for profits the plaintiff alleged she would have made upon the work which she was to do under her contract had there been no breach of it on the part of the defendant, that is, for damages claimed by her by reason of the breach of the contract on the part of the defendant, and the question presented at the threshold of the case is, can the plaintiff recover, upon motion under section 3211 of the Code as it stood when this action was brought, damages for a breach of her contract with Wilson & Co?

"If the contract is such that the person making the motion is entitled to recover *money* upon it by *action*, he is entitled to proceed to do so by motion, whether his right is based upon an expressed or implied contract. The remedy extends to all cases in which a person is entitled to recover money by action on contract." *Long* v. *Pence*, 93 Va. 586.

Section 3211 of the Code as it stood when this action was brought, provides that a person "entitled to recover money by *action on any contract* may on motion, etc., obtain judgment therefor." There have

been amendments to this section which may have enlarged its scope, but with these we have nothing to do.

In discussing this subject, Barton, in his Law Practice, 1067, says: "It will be observed, however, that the statute confines this motion to cases where one would be entitled to recover money by *action on any contract*, as distingnished from actions usually termed 'sounding in damages.'"

The revisors of the Code in 1849, in which the right to recover money by action on any contract on motion was first engrafted upon our statutes, say in their report:

"By this mode of proceeding, all claims of the Commonwealth, and a large number of those of individuals, are now recoverable; yet a formal point scarcely ever arises upon a motion. The case is very generally decided upon its merits. A brief notice serves the double purpose of a writ and a declaration; and though a defendant is not precluded from pleading, yet, as the case can be heard without pleading, pleadings are in fact very rarely filed. Seeing that this mode of proceeding has worked well in the cases in which it has been heretofore allowed, it seems to us advisable to extend it to all cases in which a person is now entitled to recover money by action on a contract. We do not propose to take away the right of bringing an action from any person; we propose merely, when his claim to money is on a contract, to allow him to use, if he please, the more simple remedy by motion, instead of an action. The permission to proceed in this way, will, we believe, cause motions gradually to take the place of actions for all such claims. It may perhaps be objected that judgments for debts generally should not be rendered so promptly as in those cases wherein judgments are now allowed on motion; but this is not really an objection to the allowance of a remedy for such debts by motion; it merely goes to show that the notice for such debts should be longer than in the cases wherein the remedy now exists."

Clearly it was not intended by the statute in affording a more speedy remedy for the enforcement of contracts by the recovery of money due thereon by motion to extend this mode of proceeding to actions usually termed "sounding in damages." Damages for an injury resulting from a breach of a contract recoverable in an action "sounding in damages" can in no sense be considered money due on a contract.

Counsel for defendant in error correctly says that the plaintiff in the court below was unquestionably entitled to recover money by an action of covenant on her contract, but his contention that the remedy by motion, under section 3211 of the Code, may be substituted for an action of covenant on the contract is wholly untenable, certainly as that section stood when this action was brought. We have been cited to no authority, and have been able to find none, which sustains this contention.

The utmost that the plaintiff had a right to recover in this mode of proceeding is the amount of the first seven items of the account filed with the notice, and therefore the verdict and judgment, including damages for the breach of the contract, embraced in items 27 and 28 of the account, is, we think, clearly erroneous and should be reversed and annulled.

It becomes unnecessary for us to consider other questions raised in the record.

The judgment complained of will be reversed and annulled, the verdict of the jury set aside, and the cause remanded to the court below for a new trial to be had in accordance with this opinion.

*Reversed.*

NOTE.—As stated in the opinion in the principal case, the revisors of 1849 first introduced into our Code the statute now embodied in section 3211. In advocacy of the proceeding by motion they say that "as the case can be heard without pleading, pleadings are in fact very rarely filed." This language might seem to import that an issue might be raised by oral pleadings, and so it was held in one case, but in other cases it has been construed to mean that *formal* pleading was unnecessary and that *formal* pleas were rarely filed.

In *Supervisors* v. *Dunn*, 27 Gratt. 608, 620, which was a proceeding by motion under what is now section 3210 of the Code, it was said: "The proceeding was by a mere motion, founded upon a mere notice, upon which no formal pleadings were required." In this case, however, formal pleas were filed, and on the issue made by one of them the case was tried.

*Bunch's Ex'or* v. *Fluvanna County*, 86 Va. 452, was an appeal from a decision of the Board of Supervisors of Fluvanna county, to the county court of that county. This the court treated as a *motion*, and Judge Lewis, in the course of his opinion, says: "The proceeding was a mere motion, in which no formal pleadings are required, and in which, therefore, it was competent for the county to make, *ore tenus*, any defence that could be appropriately made by plea in a regular action."

Both of these cases are cited by Judge Buchanan in the opinion of the court in *Hall* v. *Ratliff*, 93 Va. 328 (which was a proceeding under sections 910 and 912 of the Code by a treasurer against his deputy), for the following proposition: "As the proceeding was a mere motion, formal pleadings were not required. It was competent for the defendants, as well without as with pleas, to make any proper defence." In this case formal pleas were filed, but no issue was joined on any of them, though the jury was sworn to try the *issue joined*. The verdict, however, was not set aside *for this cause*.

In two of the foregoing cases formal pleas were filed, and in each case the court said that *formal* pleadings were unnecessary, but said nothing as to a hearing *without pleadings*, while in *Bunch's Ex'or* v. *Fluvanna County*, 86 Va. 452, it is distinctly declared not only that *formal* pleadings were unnecessary, but that the defendant could "make, *ore tenus*, any defence that could be appropriately made *by plea* in a regular action." This was a contested case.

In *Preston* v. *Salem Improvement Co.*, 91 Va. 583, it was held that all rules of

pleading were not abrogated by section 3211, and while *formal* pleas were not necessary, yet the defendant must by informal plea or statement of the ground of his defence in writing present an issue before he could demand a jury trial, and that he could not produce his defence "orally in the progress of the trial." It is further said in the opinion that "no verdict can be rendered, or judgment entered thereon, in any case, unless issue shall have first been joined on the pleadings." In the editorial note to this case, 1 Va. Law Register 450, it is said that the issue in cases of this kind may be raised by formal plea, or "more informally, perhaps, as suggested by the court, by the statement in writing of the grounds of defence to which the plaintiff may reply, and thus make up an 'issue.' But, in any event, there can be no trial by jury except of an 'issue of fact' made up in some way, whether formally or informally." This case seems to be in conflict with *Bunch's Ex'or* v. *Fluvanna County*, *supra*, but not with the other cases cited. In practice, the trouble is usually solved by the plaintiff calling for a statement of the grounds of defence which he has a right to have in writing under the provisions of section 3249 of the Code. The statute does not in terms declare that the statement shall be in writing, but that the court "may order a statement to be filed . . . of the ground of defence," and nothing but a *written* statement could be *filed*.

Section 3211 of the Code is of growing importance, and for the sake of reference we mention the following other points arising under it which have been passed upon by the court. It has been held that the motion may be made returnable to any day of the term. *Hanks* v. *Lyons*, 92 Va. 30; that a motion will lie to recover for a loss under a fire insurance policy, *Morotock Ins. Co.* v. *Pankey*, 91 Va. 259; or under a life insurance policy, *Union Central Life Ins. Co.* v. *Pollard*, 94 Va. 146; *Grubbs* v. *Ins. Co.*, 94 Va. 589; and that a motion may be maintained in the name of an assignee against a remote assignor, *Long* v. *Pence*, 93 Va. 584.

M. P. BURKS.

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## GLENN V. CUTSHAW, CITY ENGINEER.*

*Supreme Court of Appeals:* At Richmond.

February 2, 1899.

1. DELINQUENT LANDS—*When survey unnecessary—Mandamus.* Where a Corporation Court has, under the provisions of section 666 of the Code, as amended by Acts of 1897-8, decided that an additional survey need not be made because a sufficient description of the lot can be obtained from the records, there is no necessity for a report by the City Engineer, and hence *mandamus* will not lie to compel him to make such report.

Original application for a *mandamus*. *Refused.*

*S. A. Anderson*, for the petitioner.

*H. R. Pollard*, for the respondent.

The following order was entered by the court:

"This day came again the parties by counsel, and the court having

* Reported by M. P. Burks, State Reporter.